

**FLINTSHIRE COUNTY COUNCIL**

**REPORT TO:** **PLANNING & DEVELOPMENT CONTROL COMMITTEE**

**DATE:** **14<sup>th</sup> MAY 2014**

**REPORT BY:** **HEAD OF PLANNING**

**SUBJECT:** **APPEAL BY MR.M ROONEY AGAINST THE DECISION OF FLINTSHIRE COUNTY COUNCIL TO REFUSE PLANNING PERMISSION FOR THE USE OF LAND FOR THE STATIONING OF CARAVANS FOR RESIDENTIAL PURPOSE FOR 5 No. GYPSY PITCHES TOGETHER WITH THE FORMATION OF ADDITIONAL HARDSTANDING AND UTILITY DAYROOMS ANCILLARY TO THAT USE AT LAND ADJACENT TO EWLOE BARN WOOD, MAGAZINE LANE, EWLOE - ALLOWED.**

**1.00 APPLICATION NUMBER**

1.01 050463

**2.00 APPLICANT**

2.01 MR.M.ROONEY

**3.00 SITE**

3.01 LAND ADJACENT TO EWLOE BARN WOOD, MAGAZINE LANE, EWLOE

**4.00 APPLICATION VALID DATE**

4.01 01.02.13

**5.00 PURPOSE OF REPORT**

5.01 To inform Members of the Inspectors decision in relation to an appeal into the refusal of planning permission for the 'Use of land for the stationing of caravans for the residential purpose for 5No. gypsy pitches together with the formation of additional hard standing and utility/dayrooms ancillary to that use'. The application was refused by Planning and Development Control Committee on 15<sup>th</sup> May 2013. The

appeal was considered through a Public Inquiry. The Appeal was ALLOWED.

- 5.02 An application for full costs was made against the Council and a partial award was given in relation to the work undertaken prior to the withdrawal of the air quality reason for refusal and in respect of any work undertaken in relation to the reason for refusal relating to the power lines.

## 6.00 **REPORT**

### 6.01 Background

The Inspector referred to the previous Inspectors' decision and specifically paragraphs 103 and 104 of Inspector Gardener's Appeal Decision which state:

*9.1 "Very exceptional circumstances are therefore in place sufficient to outweigh the green barrier impacts I have described. I would therefore grant planning permission for the proposal other than for an unresolved matter which I return to next.*

*9.2 Nevertheless, on a precautionary basis, I do not consider that planning permission should yet be granted. I have set out my concerns at the possibly unsatisfactory living conditions which the site might provide because of traffic noise and pollution. PPW advises, in relation to noise levels, that a careful assessment should be made before determining planning applications, possibly with a technical noise assessment provided by the applicant. TAN 11 points out that the weight to be given to such matters may be affected by other considerations, such as the need for the proposed development. Whether that is so or not in this case cannot be properly assessed until the implications of traffic noise and pollution from the A55 are known."*

- 6.02 The Inspector noted that the Council withdrew their objection to the proposal relating to air pollution.

### 6.03 Issues

The Inspector noted that the Statement of Common Ground states that if he found that there would not be any unacceptable living conditions on the site the harm caused to the Green Barrier is clearly outweighed by other considerations amounting to very exceptional circumstances and planning permission should be granted. Accordingly, the main issue in this case is whether the noise from traffic using the A55 would materially harm the living conditions of the occupiers of the appeal site. The Inspector referred to UDP policies and guidance in Technical Advice Note 11 Noise.

- 6.04 TAN 11 explains that when deciding the NEC of a site the noise levels should be representative of typical conditions. The noise expert did not ascertain what the normal level of traffic using the A55 was on a typical weekday in October. However, there is absolutely no evidence

before me that the level of use of the A55 was anything other than typical. The survey displays all the characteristics of a typical weekday's use of the A55. There were no suggestions that traffic numbers were any higher or lower than usual or that the speed of traffic was significantly slower or higher than usual or that any other relevant factor was anything other than typical.

- 6.05 It was also suggested that the traffic conditions were not typical because the A55 is significantly busier in the summer season when tourists and visitors would be using it. Again there was no empirical evidence to support the assertion that the levels of traffic in the summer are significantly higher than in October. Further, there was no evidence as to what the effect, if any, would be if higher volumes of traffic were using the A55. There was a general consensus that higher volumes of traffic may be travelling slower than when normal volumes of traffic are using the road and thus the noise levels would decrease. The Council did not suggest to the appellant at the application stage that further noise measurements should be carried out at other times of the year or in other weather conditions. The Inspector stated that he is aware that the onus is on the appellant in a case such as this but having carried out a noise survey that is prima facie compliant with TAN 11 I consider the Council should have asked for further information if they considered the survey not to be typical. In any event the Inspector was satisfied that the noise survey complies fully with TAN 11.
- 6.06 Without any mitigation the levels of noise at the appeal site fall within NEC C for both day and night. TAN 11 explains that planning permission should not normally be granted in such circumstances. However, it is proposed to build a bund and erect a fence to act as a noise barrier. The noise barrier would be built adjacent to the A55 and also adjacent to parts of the site's side boundaries. The Inspector was advised that the top of the noise barrier would be a minimum of 2 metres higher than the level of the carriageway along the A55 – this was not disputed. The appellant calculated that the noise barrier would have the effect of reducing the level of noise within the site by 12db. This would bring the external noise environment within the high end of NEC A (daytime) and the low end of NEC B (nighttime).
- 6.07 TAN 11 explains that noise within:
- *NEC A need not be considered as a determining factor in granting planning permission, although the noise level at the high end of the category should not be regarded as desirable.*
  - *NEC B should be taken into account when determining planning applications and, where appropriate, conditions should be imposed to ensure an adequate level of protection.*
- 6.08 During the night time the Inspector stated that he would expect that the majority of the occupiers of the site would be within their static caravan. The relevant British Standard requires static caravans to

have a noise reduction index exceeding 35dB. When applying that 5 BS standard the noise within the living rooms and bedrooms of the static caravans would be reduced to a level that was good. During the daytime the dayrooms would be in use. The Inspector was not provided with any evidence as to what the levels of noise would be within these structures. He had no doubt from my own experience that the noise levels would be wholly acceptable even if the dayrooms were being used for rest.

6.09 The Inspector noted that the Council suggested that the noise barrier would not be as effective as the noise expert claims. They are of the view that the noise from the A55 should be measured at a level 0.5m above the level of the road – as set out in the Welsh Office document entitled “Calculation of Road Traffic Noise” (the CRTN methodology). The noise expert measured the noise at road level. It was agreed that the primary source of noise would be at road level.

6.10 The Inspector did not accept the Council’s criticism of the noise expert’s approach for the following reasons:

- TAN 11 does not advocate the CRTN methodology.
- The CRTN methodology is used where the noise source is not in existence –in this case it is.
- The CRTN methodology cannot be translated into, or compared against, TAN 11 criteria.
- The appellant’s calculations were based on the noise barrier being 2 metres higher than the level of the A55. For the majority of its length the noise barrier would exceed that height.
- There was no explanation of the physics involved to explain why the noise barrier would be less effective than that claimed by the appellant’s noise expert.

Accordingly, the appellant was unable to challenge that assertion.

6.11 The Council referred to the noise maps published by the Welsh Government. Having regard to the noise maps the Council suggested that the average levels of noise maybe higher than as measured by the appellant’s noise expert. However, these noise maps carry the following warning, “*The noise levels in these maps are calculated rather than measured and are based on assumptions. So the maps should not be relied upon to tell how noisy it really is outside specific properties*”. As stated above, the Council do not have any evidence, so far as the Inspector was aware, to contradict the levels of noise as recorded by the appellant’s noise expert.

6.12 There was much discussion at the Inquiry as to whether it would be possible to prohibit the use of touring caravans on the pitches as overnight sleeping accommodation. There were no calculations as to what the levels of noise would be within the touring caravans. However, the Inspector considered that it is unlikely that the touring caravans would be used as such because:

- The touring caravans will often be off-site as the gypsies travel

to seek out work away from the site.

- When the touring caravans are on site it seemed unlikely to the Inspector that they would be used as sleeping accommodation because of the greater degree of comfort and quiet that would be achieved by sleeping within the static caravan.

- 6.13 The Inspector also had regard to the assertions made by the Council that the noise barrier will be as effective as claimed because of the distance of the static caravans from the noise barrier. This was a matter which the appellant's noise expert disputed. The Inspector did not have sufficient evidence before him to accept the Council's view that the noise barrier will not be as effective as has been claimed.
- 6.14 The Inspector was aware that the appellant's noise expert made no specific reference to the HGV convoy effect in his initial Environmental Noise Survey dated 16 October, 2012 (the October Survey). However, the effect of the HGV convoy on noise readings is clearly recorded in the results of the October Survey. The fact that there was no specific reference in the text of the October Survey to the HGV convoy does not undermine its conclusions. The Inspector did not consider that this matter requires any further exploration or evaluation as suggested by the Council. The results reflect the typical conditions of the night-time use of the A55 by the HGV convoy. Further, there is no evidence before me that any individual noise events during the night time period occur with such regularity that the site should be treated as being within NEC C.
- 6.15 The Inspector had regard to the high levels of noise outside the static caravans and dayrooms during the daytime. He recognised that a significant number of children, as well as adults, are likely to be on the site at various times and using the outdoor area for recreation and leisure.
- 6.16 Having regard to all the evidence that is before him, including his own experience, he did not consider that the external noise climate would be unacceptable. It would clearly be possible to secure lower levels of noise within each individual pitch by the erection of further enclosures typical of many rear garden areas found throughout the country.
- 6.17 He is aware from his own experience that road noise increases in wet weather. The survey was carried out when the A55 was dry. The appellant's noise expert's opinion was that the noise within the site from traffic using the A55 in wet conditions would still be acceptable. Further, in those weather conditions the occupants of the site would be likely to be inside the utility / day rooms or the static caravans.
- 6.18 Further, the Inspector did not consider that the noise within the site would be materially louder even if the wind direction differed from that when the noise survey was carried out. On the balance of probabilities he concludes that the noise from traffic using the A55 would not

materially harm the living conditions of the occupiers of the appeal site following the construction of the noise barrier subject to its retention thereafter. Accordingly, the proposal accords with the relevant provisions of the development plan.

6.19 Other Matters

The Inspector had regard to the concerns raised by local residents and others regarding inappropriate development, harm to the openness of the Green Barrier, harm to the character and appearance of the area, highway safety, drainage, ecology and sustainability. All these matters were addressed by Inspector Gardener in his Appeal Decision and by the Council in their Committee Report. Inspector Gardener found that very exceptional circumstances outweighed any harm that arose from these matters and the Council concurred with that view at the Inquiry. The Inspector also agrees with that assessment.

6.20 He was advised that the only difference between the scheme that was before Inspector Gardener and the appeal proposal is that the noise barrier has been increased in height and extended in total length. Parts of the additional noise barrier are likely to be seen by users of Magazine Lane and the A55. Further, some works have been carried out to the vegetation growing between the A55 and the appeal site. However, he did not consider that in the context of the scheme that was before Inspector Gardener the additional parts of the noise barrier materially alters the level of harm to the character or appearance of the area or the impact on the openness of the Green Barrier. Further, a landscaping scheme would need to be approved and this would provide opportunities for introducing new vegetation (where necessary) around the perimeter of the site to reduce the visual impact of the noise barrier.

6.21 The Inspector has noted the concerns of the neighbouring farmer of potential harm to his livestock and business generally if the watercourses adjacent to the appeal site become polluted due to a failure to maintain any cesspit that is used for the disposal of foul water. However, any foul water disposal system must first be agreed in writing by the Local Planning Authority and Welsh Water would need to be re-consulted. He is satisfied that a safe system for the disposal of foul water could be provided on the appeal site. If there was to be an escape of effluent that results in damage to the adjoining owner's property there are civil law remedies available to him. The Inspector stated that it is not possible for him to impose a condition requiring any future occupiers of the appeal site to take out public liability insurance.

6.22 He is aware that the ditch adjacent to Magazine Lane is not currently well maintained. There are powers available to the Council to require action to be taken if the failure to maintain the ditch prevents the free flow of water.

6.23 Conditions

The Inspector considered the conditions suggested by the Council and others discussed at the Inquiry in the light of the advice in Circular 35/95 "*The Use of Conditions in Planning Permissions*" (the Conditions Circular). He imposed the conditions suggested by the Council with some amendments. Other minor amendments have been made to the conditions to reflect advice in the Conditions Circular.

6.24 The Inspector imposed conditions requiring:

- The noise barrier to be erected prior to the occupation of the site and for its retention thereafter as agreed at the Inquiry. This is necessary to protect the residents of the site from exposure to excessively high levels of noise.
- That the touring caravans shall not be used as overnight sleeping accommodation unless otherwise agreed in writing by the Council. This is because the Inspector does not have any evidence that the night-time noise within the touring caravans would be of an acceptable level. He is aware that the Council does not consider such a condition to be enforceable and thus fails to comply with advice in the Conditions Circular. While the Inspector understands the difficulties of securing evidence to show that the condition has been breached, he considers from his experience whilst this condition may present some evidential difficulties it would be possible to secure compliance with the condition without unacceptable difficulties.

6.25 The Inspector considered that there was no need for a temporary permission in this instance. The very exceptional circumstances outweigh the harm to the Green Barrier. It was agreed at the Inquiry that even if the emerging LDP progressed in accordance with the proposed timetable it would not meet all the accommodation needs for the gypsy and traveller community in the area. The Inspector therefore granted a permanent consent which was not personal to the occupiers. The site can therefore be occupied by any persons defined as a gypsy and traveller.

6.26 The Inspector also did not consider it relevant to impose the condition relating to the approval of the plan for the construction of the bund as suggested by the Council in relation to the issues of safety and the overhead power lines. He was not convinced that it is either reasonable or necessary as there was no evidence before him to show that the residential use of the site would be inherently unsafe for the occupiers.

6.27 Costs application

The appellants made an application for a full or partial award of costs against the Council in respect that the Council acted unreasonably with regard to all reasons for refusal. A partial award of costs was

allowed.

- 6.28 In relation to the noise reason for refusal the Inspector considered that the Council did not require additional noise information that exceeded that required by TAN 11 and the Council's decision on this issue amounts does not amount to unreasonable behavior but merely a difference in approach.
- 6.29 The Council did not produce any evidence as to the levels of noise on the appeal site from traffic using the A55 and attempted to undermine the appellant's evidence through a critique. It was agreed at the Inquiry that the onus of showing living conditions would be acceptable falls on the appellant. The Inspector did not consider that the Council's approach to the noise evidence amounts to unreasonable behavior.
- 6.30 In respect of the air quality reason for refusal and the matters covered in the submitted Addendum report, the Inspector noted that there is no obligation on the Council to assess or manage the matters which were covered in this report or which were of concern to the Council. The Council accepted that the proposal met current standards, however, the Council were aware that a report from the World Health Organisation (WHO) that questions whether the existing standards are adequate. Accordingly, the Council Officer advising on these matters could not support the application without knowing if the pollutants identified by the Council had been assessed at the appeal site and whether the potential risks associated with them had been fully investigated. The Inspector did not consider that the Council's precautionary approach regarding this matter amounts to unreasonable behaviour.
- 6.31 The appellants submitted an Addendum Report in relation to the Air Quality reason for refusal at the same time as lodging the appeal with the Planning Inspectorate on 21st October 2013. Given the conclusions of the Addendum Report the appellant asked the Council to withdraw the "air quality" reason for refusal within 14 days i.e. by 5 November 2013. The Council confirmed on 16 January 2014 that they wished to withdraw the Air Quality reason for refusal. By that date the appellant's air quality expert had produced a draft Proof of Evidence. The Inspector considered the Council's conduct in relation to this matter amounts to unreasonable behaviour. He was aware that there were delays in:
- obtaining the advice of the relevant Environmental Health Officer who is responsible for these matters, and
  - getting the relevant authority to withdraw this reason for refusal from the relevant Committee.

However he felt that the appellant was entitled to recover his wasted costs in respect of preparing the proof of evidence in relation to this reason for refusal between 5<sup>th</sup> November 2013 and 16<sup>th</sup> January 2014.



- 6.32 With regard to the reason for refusal relating to the power lines the Inspector noted the conclusions of Inspector Gardener who stated “They do not present a significant risk to future occupants.” The Inspector referred to the response from Scottish Power Energy Networks (SPEN) and the paragraphs of the Committee Report which dealt with this issue. At the time the Council made their decision they did not know what the clearance distance was between the bund / fence and the power lines. There was no explanation from the Council as to why SPEN did not either know or ascertain this information. In the run up to the Inquiry the appellant measured the current clearance distance and the shortest distance between the ground and the power lines is about 7.993m. The bund would be 2m in height. Assuming the existing lowest point of the power lines would be above the proposed bund there would still be a clearance of 5.99m between the ground level at the top of the bund and the power lines. The Inspector was advised that the minimum distance is 5.2m.
- 6.33 The appellant considers the Council acted unreasonably:
- In having regard to the issue of health and safety at work because this is a matter that is controlled by other legislation.
  - By the Council failing to consider whether this was a matter that could be addressed by the imposition of a condition.
- 6.34 The Inspector agrees with the appellant in respect of this matter. The issue of the safety of workers is governed by a separate regime of controls and in my view there was unreasonable behaviour on the part of the Council to refuse the application on this basis because:
- The development would not reduce the clearance distance between the ground and the power lines to an unacceptable degree.
  - Even if it did, the matter could have been dealt with by way of a condition prohibiting development until the issue of the power lines had been resolved.
- 6.35 While an employee of SPEN prepared a Proof of Evidence in anticipation of the Inquiry – he did not give evidence because he concluded that a condition could be imposed that would deal with their concerns. However, mention was made within the Proof of Evidence that the reduction in clearance between the ground and the power lines would fail to maintain the safety of users of the site. There is no explanation as to why the future users of the site would be endangered. The Inspector therefore concluded, for the reasons explained above, that the appellant is entitled to his costs of dealing with this reason for refusal.
- 6.36 With respect to the green barrier reason for refusal the Inspector concluded that this reason for refusal amounts to unreasonable behaviour by the Council. It is clear from all the documentation that the Officers advising the Committee were fully aware of Inspector Gardener’s conclusions on this issue, however, there are material

differences between the bund/fence that was proposed in the first appeal and the noise barrier currently proposed. The Inspector did not consider that it was unreasonable behaviour on the part of the Council to conclude that the noise barrier would cause harm to the openness of the Green Barrier and materially harm the landscape of the Green Barrier.

## **7.00 CONCLUSION**

7.01 The appeal is allowed and permanent planning permission is granted for the use of the land for the stationing of caravans for residential purpose for five gypsy pitches together with the formation of additional hard standing and utility dayrooms ancillary to that use. There are a number of pre-commencement conditions in respect of;

- Detailed design of the access
- Details of visibility splays
- Landscaping scheme including the bund and boundary treatment
- Approval of materials for day rooms.

7.02 There are a number of pre-occupation conditions relating to;

- Disposal of foul sewage and surface water
- Erection of bund and fence
- Static caravans to be in accordance with BS 3632:2005

7.03 A partial award of costs was granted to the appellant in relation to the work undertaken prior to the withdrawal of the air quality reason for refusal and in respect of any work undertaken in relation to the reason for refusal relating to the power lines.

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